

ROCKIES EXPRESS DEALT A BLOW; RECEIPTS FROM TRANSPORTING GAS SOLELY WITHIN OHIO NOT EXCLUDED FROM PUBLIC UTILITY GROSS RECEIPTS TAX

FEBRUARY 24, 2020



DEBORA D. MCGRAW, JD, CPA, LLM

MEMBER

The Ohio Supreme Court (“Court”) recently considered the application and constitutionality of the Ohio public utility excise tax on certain receipts earned by an interstate pipeline. *Rockies Express Pipeline, LLC v. McClain*, Slip Opinion No. 2020-Ohio-410 (February 11, 2020). The receipts at issue were paid to Rockies for transporting natural gas that entered Rockies’ pipeline in Ohio and was delivered to a location within Ohio. Approximately 94.1% of the gas delivered in Ohio was delivered to another interstate pipeline, 1.9% was distributed to a local distribution company, 2.8% was delivered to an industrial end-use customer and 1.2% was “delivered” to a virtual delivery point referred to as a “hub pooling point.” Rockies argued that the gross receipts for transporting the natural gas in these situations was excludible pursuant to R.C. 5727.33(B)(1) “receipts derived wholly from interstate business.” In the alternative, Rockies argued that the imposition of the tax violated the Commerce Clause of the United States Constitution.

The Court noted that the exclusion at issue in R.C. 5727.33(B)(1) was enacted in 1910. The Court determined that the plain language of the exclusion did not support the exclusion of Rockies’ gross receipts as “interstate” sales. Because the term “interstate” is not statutorily defined, the Court applied the “common, ordinary, and accepted meaning” of the term. *Id.* at ¶ 12. Applying the definition in *Black’s Law Dictionary*, the Court determined the term “interstate” means: “[b]etween two or more states; between places or persons in different states; concerning or affecting two or more states politically or territorially. *Black’s Law Dictionary* 651 (2d Ed.1910).” *Id.* Applying this meaning, the Court concluded that the gross receipts at issue were not from interstate sales: “The state does not seek to tax any receipts generated from transporting gas from Ohio to another state. Rather, the tax commissioner seeks to tax only those receipts that are derived from the transportation of gas that entered Rockies’ pipeline in Ohio and exited the pipeline at a delivery point in Ohio.” *Id.* at ¶ 13. The Court viewed those receipts as taxable receipts generated from “business done within this

state,” R.C. 5727.33(A). Because the Court determined that the statute was not ambiguous, the Court also rejected Rockies’ argument that the Court should examine Commerce Clause cases decided around the time of the enactment of the statutory exclusion to determine what the General Assembly intended to exclude from taxation as interstate commerce.

Rockies also relied on the Court’s decision in *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, to argue that its transportation of natural gas to each of the delivery points at issue constitutes movement through interstate commerce within the exclusion in R.C. 5727.33(B)(1). In *Columbia Gas*, the taxpayer was unsuccessful in arguing that its operations as a federally regulated interstate pipeline were subject to disparate tax treatment in Ohio as compared to local distribution companies in violation of the Commerce Clause. However, the Court had acknowledged in *Columbia Gas* that under federal law, “the transportation of natural gas by an interstate pipeline directly to an end user constitutes transportation in interstate commerce, not local distribution.” *Id.* at ¶ 18. Rockies relied on this language in *Columbia Gas* to argue that its deliveries to other interstate pipelines, to local distribution companies, and to an industrial end user all constitute interstate commerce and thus fall under the interstate-business exclusion in R.C. 5727.33(B)(1). The Court disagreed with Rockies’ reliance noting that the federal authorities invoked in *Columbia Gas* addressed whether a matter fell under FERC’s exclusive jurisdiction under the Natural Gas Act: “A determination that an activity falls within FERC’s regulatory authority as a matter of interstate commerce does not foreclose every other form of state regulation affecting that activity.” *Rockies Express* at ¶ 19. Thus, the Court determined that its holding in *Columbia Gas* did not preclude the imposition of the public utility excise tax on the **intra-state** business receipts of an interstate pipeline.

Rockies also argued that the public utility excise tax should not be imposed on the hub pooling points because these points were virtual locations; not true physical locations. The Court determined that the tax was imposed on business done in Ohio, not on delivery to an Ohio location. The Court found that Rockies had not met its burden of proving that the receipts related to interstate commerce within the exclusion set forth in R.C. 5727.33(B)(1).

Having found that the receipts at issue were not “interstate” receipts within the exclusion in R.C. 5727.33(B)(1), the Court then considered whether the imposition of the excise tax violated the Commerce Clause of the United States Constitution. Relying on the first part of its decision in *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, 2016-Ohio-7760, 88 N.E.3d 900, the Court noted that it had held that “physical presence in a state may furnish a sufficient basis for finding a substantial nexus.” *Rockies Express* at ¶ 42. “Rockies has substantial nexus with Ohio based on its physical presence within the state. That physical presence manifests itself in the interstate pipeline that Rockies installed across the width of Ohio—a pipeline that enables it to transport natural gas for its customers. By installing and transporting natural gas through that pipeline, Rockies has availed itself of the privilege of carrying on business in Ohio.” *Rockies Express* at ¶ 27.

The Court also made an important distinction. It determined that Rockies earned its gross receipts from transporting gas, not selling gas: “The public-utilities excise tax is a form of privilege tax, R.C. 5727.30(A), and the measure of that privilege stems from Rockies’ gross

receipts, R.C. 5727.33(A). To be sure, Rockies earns its gross receipts from transporting gas, which is a transient commodity; however, the gas itself is not being taxed.” The Court therein affirmed the Ohio Board of Tax Appeals decision denying the “interstate” exclusion in R.C. 5727.33(B)(1) and finding that the imposition of the public utility excise tax on Rockies did not violate the Commerce Clause of the United States Constitution.

If you would like to further discuss the *Rockies Express* decision or any other state and local tax matter, please contact Debora McGraw or one of our other ZHF professionals.

# ZAINO HALL & FARRIN LLC

A T T O R N E Y S   A T   L A W

[WWW.ZHFTAXLAW.COM](http://WWW.ZHFTAXLAW.COM)

**614-326-1120**

**855-770-1120 (toll-free)**

**RON AMSTUTZ**

(non-attorney professional)  
614-782-1545(Direct)  
330-347-3533 (Mobile)  
ronamstutz@zhfconsulting.com

**DAN DODD**

614-782-1554 (Direct)  
740-973-5930 (Mobile)  
dandodd@zhfconsulting.com

**STEPHEN K. HALL**

614-349-4812 (Direct)  
614-284-1253 (Mobile)  
shall@zhftaxlaw.com

**DEBORA D. MCGRAW**

614-349-4813 (Direct)  
614-595-5560 (Mobile)  
dmcgraw@zhftaxlaw.com

**JOHN R. TRIPPIER**

(non-attorney professional)  
614-349-4815 (Direct)  
614-203-4173 (Mobile)  
jtrippier@zhftaxlaw.com

**JASON W. WALKER**

(non-attorney professional)  
614-349-4817 (Direct)  
916-533-1626 (Mobile)  
jwalker@zhftaxlaw.com

**RICHARD S. BITONTE**

(non-attorney professional)  
614-782-1555  
rbitonte@zhfconsulting.com

**RICHARD C. FARRIN**

614-349-4811 (Direct)  
614-634-3130 (Mobile)  
rfarrin@zhftaxlaw.com

**PHILLIP L. LAWLESS**

(non-attorney professional)  
614-349-4821 (Direct)  
614-565-6098 (Mobile)  
plawless@zhftaxlaw.com

**BRAD W. TOMLINSON**

(non-attorney professional)  
614-349-4818 (Direct)  
btomlinson@zhftaxlaw.com

**JENNIFER R. TURNER**

(non-attorney professional)  
614-782-1642 (Direct)  
502-594-9297 (Mobile)  
jturner@zhftaxlaw.com

**THOMAS M. ZAINO**

614-349-4810 (Direct)  
614-598-1596 (Mobile)  
tzaino@zhftaxlaw.com